

SPECIAL POINTS OF IN- TEREST:

- The burden to establish that an injury rises to the level of "serious bodily injury" is a heavy burden
- New Title IX regulations require districts to apply special education discipline provisions.
- Districts must consider individualized PBSPs that are based on FBAs when a student's behavior impedes their ability to learn.

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Serious Bodily Injury

The IDEA recognizes three circumstances under which schools can remove a student to a 45 school day Interim Alternative Education Placement without regard to whether the behavior is a manifestation of the child's disability. One of those circumstances is when a student has inflicted "serious bodily injury" upon another person while at school, on school premises or at a

school function.

The definition of "serious bodily injury" under the federal criminal code is stringent. The term means bodily injury which involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or mental faculty. Hearing Officer's have

held schools to a high threshold when determining that an injury constitutes a "serious bodily injury" and most injuries will not meet this standard. In fact, one PA hearing officer held that most student assaults of another student, teacher or administrator, even those producing genuine pain or discomfort, will not meet this definition.

[Read More about What Hearing Officer's Look For on page 3](#)

Title IX and Special Education Discipline

The Title IX regulations were again revised and became effective August 1, 2024. While some of the changes therein are controversial, the regulations strengthened and clarified the rights of special education students who are involved in the Title IX process. Title IX coordinators should be reminded of their duty now to consult with one or more members of a student's IEP or 504 Teams about the student in the course of complying with Title IX requirements.

[Review how Title IX affects discipline decisions for special education students on page 5](#)

CASE LAW UPDATE

Upper Darby School District v. K.W.

Behavior Management

3rd Circuit Court of Appeals

Issue: The 3rd Circuit affirmed a District Court's award of \$128,635 in compensatory education for an elementary school student with autism, finding that the School District denied the student FAPE for 2 years by failing to appropriately address the child's behaviors.

Facts: K.W. was placed by the school district in a private school beginning in the spring of 2019. In September of that year, an independent evaluator issued an IEE concluding that K.W. had significant disabilities in executive functioning and social-emotional functioning including hyperactivity, rule-breaking behavior and aggression. K.W.'s school described behaviors including shouting obscenities, hitting and kicking and eloping from the classroom. K.W. changed private schools for the 2020-2021 school year, but the IEP was not revised and did not include an FBA or PBSP, and in fact noted that K.W. did not exhibit behaviors that impede learning or the learning of others.

During the 2020-2021 and 2021-2022 school years, K.W.'s behavior continued to escalate. K.W. was often frustrated, yelling and running around the classroom. Although a school wide PBSP was used, no individualized PBSP was added to the IEP. During the summer of 2021, another IEE was conducted which again noted K.W.'s behaviors and found that K.W. required an individualized PBSP based on an FBA. The District did neither.

Data from the 2021-2022 school year showed that K.W.'s behaviors "deteriorated." K.W. was exhibiting physical and verbal aggression, inappropriate social behavior, peer taunting and elopement. Despite the behavior analyst also recommending an FBA and PBSP, no changes were made to K.W.'s IEP. Parents filed for due process alleging denial of FAPE.

Analysis: The IDEA requires that when a child's behavior impedes their learning or that of others, the IEP team must consider the use of positive behavioral interventions, supports, and strategies to address the behavior.

The Court noted that from the start of the 2020 school year, K.W. increasingly exhibited behaviors that interfered with learning. Further, the District was aware of these behaviors and had two independent evaluators that urged the district to conduct an FBA and develop a positive behavioral support plan. Such a plan, the evaluators stated, would allow the district to "collect behavioral data and develop strategies to address behavioral problems in a systematic and consistent way." Yet the District failed to adopt those recommendations, thereby allowing the child's behavior to intensify and to continue to prevent him from making meaningful progress toward his IEP goals. The Court found this lead to a denial of FAPE. Compensatory education was awarded for full school days for two years.

Take Away: While Districts are not required to automatically adopt the findings of outside evaluations, the recommendations therein should be discussed and considered by the IEP Team. The team should document the decision to implement or not implement those recommendations. Here, it appeared that the District and the team simply ignored not one, but two recommendations for an FBA and PBSP for a child that was experiencing behavior challenges. It seems unlikely that the team would have discussed and considered the recommendations and come to the conclusion that this student did not need an FBA.

Also remember the importance of individualized plans for students. Districts can have classroom management plans that may work well for some students. However, for those students that are not responding to the classroom or school wide plan, it is imperative that FBAs are conducted and individualized plans are developed to address the needs that are not responsive to the classroom plan.



Serious Bodily Injury

(Continued from page 1)

One recent Pennsylvania case highlights the difference between “serious bodily injury” and injury to a staff member. In *C.R. v. Bensalem Township School District*, an expedited due process hearing was held after a student’s behavior incident led to the student injuring at least two district personnel. The District concluded that at least one staff member suffered “serious bodily injury” and removed the student to a 45 day interim alternative placement.

Although the hearing officer prefaced his decision as a “very close call” he did find that one of the two staff members suffered a “serious bodily injury.”

In this case, there was no dispute about the incident that occurred. The student engaged in a protracted, multi-part behavior incident that was described consistently by all witnesses. The student started by throwing water bottles at the backs of other students’ heads and then began to escalate quickly. As a result, student was removed from the classroom and taken to the counselor’s office to cool down. In the office, student’s behaviors cycled between calm and extremely escalated for about an hour.

During this time, student kicked a PCA in the stomach twice. The kick was painful and required the PCA to leave the room in pain. The student then slapped and kicked the Behavior Analyst, but did not cause injury. At this point, the school counselor entered the office. The student began to stand on his tiptoes on a chair. The counselor was concerned that student would fall and approached the student. The student swung a closed fist down on top of the counselor’s head causing immediate pain. Despite trying to block the blows, student continued to slap the counselor in the head until the Behavior Analyst could redirect student.

THE COUNSELOR’S INJURIES

That evening the counselor experienced “the worst headache” she had ever had and a sense of foginess. She could not follow a recipe or pack her lunch the next day. She was unable to sleep due to the pain. She sought medical attention the next morning and

was diagnosed with a concussion. She was told to avoid activities that could reagravate the injury and was placed on light work. She missed two days of work. She could not engage in strenuous work or anything that required mental focus. Her screen time was limited to 4 hours per day. Teaching classes induced bad headaches, foginess and confusion. She also had difficulty finding the right words in a conversation.

A few weeks later, she returned to the doctor, but her symptoms had not improved. By the hearing date, she continued to experience headaches, forgetfulness and difficulty finding words. She was still taking over-the-counter medication for the pain.

PCA’S INJURIES

In contrast, the PCS continued to have pain for two days from the kick to her stomach. She did not take time off of work. She did seek medical care and was diagnosed with an abdominal contusion. By the hearing, she still had some soreness but her symptoms had improved.

HEARING OFFICER’S CONCLUSION

The Hearing Officer found that both employees sustained “bodily injury.” Looking solely on the pain level experienced by both employees, the hearing officer concluded that this did not constitute serious bodily injury. He ended his analysis there with the PCA—her pain alone did not rise to the level of serious bodily injury.

However, the counselor’s injuries included more than just physical pain. He concluded that her mental faculty—her ability to perform mentally strenuous tasks for a sustained period of time and her ability to “find” words when speaking—was impaired as a result of the injury. Further, at the time of the hearing, which was 20 days after the incident, her symptoms were ongoing, which could lead to the conclusion that her injuries were “protracted.” Her injury therefore met the definition of serious bodily injury.

The hearing officer did stress that this incidents must be looked at on a case by case basis.

WHAT DO YOU THINK?

Cody is a member of the high school basketball team and also has an IEP for cognitive deficits and ADHD. Cody however, often talks back to the coach and decided on his own to take a day off of practice to get a “mental break.” As result of skipping practice, the Coach benched Cody for the next game. Cody became agitated and confronted the Coach. He was suspended for two weeks from the team for disrespect. A few weeks later, Cody is suspended from school for making an inappropriate comment to a teacher. The Coach and Athletic Director decide Cody should be removed from the team for the remainder of the year. Although Cody’s dad agreed with the decision and called Cody’s behavior “indefensible,” Cody’s mom filed for due process, alleging among other things, that the District failed to accommodate Cody’s disability to allow for him to play on the basketball team and discriminated against him on the basis of his disability.

Do you think Cody was discriminated against?

- A. Yes, the student made the basketball team and should be permitted to remain on the team. His behavior was clearly related to his disability
- B. No, the coach has the authority to dismiss any kid from the team for any reason.
- C. No, Cody was clearly cut from the team for violating rules and not because he had a disability.

A Kentucky District Court reviewed a similar case and found no evidence that the District discriminated against the student on the basis of a disability. Rather the student was dismissed from the team for violation of team rules. In some cases, the behaviors of a student with a disability may prevent or impede participation in extracurricular activities and districts should take steps to accommodate those barriers. Here, while the District was able to prove that the student was removed due to a history of aggressive and disrespectful behaviors that were not related to the child’s disability, the District may have considered meeting as an IEP Team to determine if any supports could have been provided so that the student could remain on the team.

Title IX and Special Education Discipline

	<p>Under the new regulations, District's may remove a student who is alleged to have engaged in sexual harassment from school on an emergency basis under certain circumstances. The regulations however make clear that special education discipline rules continue to apply.</p>
Circumstances for Emergency Removal	<ul style="list-style-type: none"> • The District has undertaken an individualized safety and risk analysis; • The District has determined that an imminent and serious risk to the health and safety of a complainant or any other student, employee or other persons arising from the allegations justified removal; and • The District has provided the student with notice and an opportunity to challenge the decision immediately following the removal, consistent with the IDEA, the ADA and Section 504
Special Education Rights	<ul style="list-style-type: none"> • The regulations relating to emergency removals does not affect the right a student with a disability has to discipline protections under the IDEA, Section 504 or the ADA • Like all discipline, a district may have to treat a student with a disability differently than a student without a disability
What Should District's Do?	<ul style="list-style-type: none"> • Emergency removals would still require the District and IEP Team to conduct a manifestation determination review • Issue a NOREP with the determination • Issue Procedural Safeguard notices
What if it is a manifestation of the child's disability?	<ul style="list-style-type: none"> • The regulations make clear that nothing therein would require a district to remove a student when it is determined that the behavior is a manifestation of the child's disability • Keep in mind that parents can always agree to a temporary change of placement for discipline reasons—even if it is a manifestation of the child's disability • Schools can also seek a hearing officer's order to place a child with a disability in a 45 day placement if it is likely that the child's behavior may cause injury to another person
Consultation with IEP Team	<ul style="list-style-type: none"> • The District's Title IX department should consult with a student's IEP team before making an emergency removal decision • IEP Teams should make determinations regarding appropriate programming during the period of removal—FAPE is still required • IEP Teams should also be consulted when determining supportive measures for both the Complainant and the respondent.



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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

Andrews & Price, LLP is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.



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Tri-State Area School Study Council of the Administrative and Policy Studies Department of the School of Education of the University of Pittsburgh seeks ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community.

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Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.